UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIJAH DuBOSE, Appellant, vs. MATSON NAVIGATION COMPANY, a corporation, Appellee.	)	No. 22074

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

TABLE OF CASES

TABLE OF CASES (continued)

TEXTS & STATUTES

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JURISDICTIONAL STATEMENT

This is an appeal by a seaman from that portion of the judgment below which found him 75% contributorily negligent (TR 118, L.5, Clerk's Transcript, 78), and from Finding of Fact number 8 (Clerk's Transcript, 78), and Conclusions of Law numbers 4 and 5 (Clerk's Transcript, 79).[1/] Jurisdiction of the court below is granted pursuant to the provisions of the Jones Act, 46 USC, Section 688, and under the general maritime law. The jurisdiction of this court is granted by the provisions

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1. Appellant is not appealing the remainder of the lower Court's Findings of Fact and Conclusions of Law, or the remaining portion of the judgment not specifically referred to.

of Title 28 USC 1291, which gives to this court jurisdiction of all appeals from final decrees of District Courts of the United States.

SPECIFICATION OF ERRORS RELIED UPON

1. This court can, and must, review the District Court's finding that appellant was guilty of 75% contributory negligence on two grounds. First, it is clearly erroneous, and, second, this court is in as good a position as the court below to evaluate the testimony on this crucial issue.

2. The District Court's finding of contributory negligence by appellant because of his failure to get off the vessel, ask for a transfer of jobs, or make complaints to the ship's officers when he did not know of ultimate serious consequences of his injury, suffered as a result of appellee's negligence and the vessel's unseaworthiness, was improper and tantamount to a finding of assumption of risk by appellant.

3. Even if the Court were justified in making a finding of contributory negligence on the part of the appellant, a finding of 75% under the circumstances of this case is clearly erroneous and is not supported by the evidence.

STATEMENT OF THE CASE

Elijah DuBose, a forty-four year-old seaman with a tenth grade education (TR 3, L.22) signed on the SS MATSONIA on January 28, 1961, as a scullion (TR 7, L.14). He left the vessel on April 5, 1961 (TR 6, L.19-20, Plaintiff's Exhibit 1). His earnings were approximately $500.00 a month (TR 40, L.5). His assignment on the vessel was that of "silverman" in the ship's galley (TR 8, L.3). His duties as a "silverman" consisted of cleaning and polishing all of the large silverware and the silver coffee pots (TR 8, L.6). Appellant had to do his work in the dish and glassware washing room (Plaintiff's Exhibits 2(a), (b), (c) and (d)). In his working quarters, Mr. DuBose was furnished with a counter on which he polished the large silverware, two sinks for washing the silver, and a silver polishing machine (TR 8, L.16-19).[2/] Clean dishracks were kept on the table directly in back of the area where plaintiff was polishing the silver (TR 13, L.3, 24). Appellant generally stood near, and in front of, the two sinks ("E" on

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2. On Plaintiff's Exhibit 2(a), 2(b), 2(c) and 2(d), the polishing machine is marked "PM," the two sinks are "S1" and "S2", the table for the racks is "TR" and the racks for coffee pots, "RC".

any complaint to the ship's officers as he likened these bumpings to a "hand bump . . . you just ignore it" (TR 55, L.11-14). He had to do his work by standing in the confined area, and ". . .(t)hey had to be passing by. There was no other way for them to get by to do their work" (TR 31, L.2-5). Although Mr. DuBose testified that he "could have" gotten off the ship "anytime he wanted" (TR 51, L.20), he stayed aboard as ". . . that was my job there, so I stayed and did it" (TR 105, L.5).

Having worked on the vessel for a period of time, he noted that his right leg was feeling numb (TR 31, L.20). As he rubbed the outside portion of his right lower leg, he further noted a knot on the back of his leg (TR 32, L.3-15). He had not noticed any numbness in his leg before this (TR 33, L.16), had no prior trouble with his leg (TR 32, L.21), and had no trouble in passing his pre-sign on physical (TR 32, L.23, TR 33, L.8). He clearly did not realize, or have notice of, the seriousness of what was happening as a result of the bumps until after he left the vessel (TR 105, L.1-11). He reported to the San Francisco Marine Hospital where surgery for his injured leg was performed on May 1, 1961, and it was placed in a cast. Following the surgery, appellant contracted a "drop" foot. He was required to wear a metal leg brace (Plaintiff's Exhibit 6) for about four and a half months, i.e., until

September 15, 1961. Thereafter, he wore the brace intermittently for approximately five years more, i.e., until August, 1966 (TR 44, L.13 - TR 45, L.19). He returned to work on December 8, 1961 (TR 37, L.25), at which time he joined the SS NEW MARKET. He left that vessel on March 10, 1962, partly because he had to return to the Marine Hospital for a follow-up examination (TR 42, L.16-23).

Since his return to work, his leg has troubled him, for it was numb and weak and his foot and ankle were painful (TR 43, L.7). He was, however, able to perform his work despite his leg disability (TR 46, L.4). He is still suffering numbness, he has a stinging sensation on the outside of his leg (TR 43, L.50), and he has trouble sleeping on his right side and on his back because of pain in his ankle (TR 44, L.8).

ARGUMENT

I

THIS COURT CAN, AND MUST, REVIEW THE DISTRICT COURT'S FINDING THAT APPELLANT WAS GUILTY OF 75% CONTRIBUTORY NEGLIGENCE ON TWO GROUNDS. FIRST, IT IS CLEARLY ERRONEOUS, AND, SECOND, THIS COURT IS IN AS GOOD A POSITION AS THE COURT BELOW TO EVALUATE THE TESTIMONY ON THIS CRUCIAL ISSUE

The District Court's finding that there was 75% contributory negligence by appellant is reviewable in this Honorable Court on two grounds: (1) It is a clearly

erroneous finding not supported by the evidence; (2) This Court is in as good a position as the lower court to evaluate the testimony.

The United States Supreme Court has defined a finding of "clearly erroneous" as:

> "Although there is evidence to support it, the reviewing court on the entire evidence is left to the definite and firm conviction that a mistake has been committed", McAllister v. United States (1954) 348 U.S. 19

It is clear that such a mistake was committed by the court below.

The District Court found that: plaintiff made no request to be transferred to another job or to another location, did not complain to his Union delegate or to any of the ship's officers (but he did complain to the dish runners who were bumping him), and that he was not required to stay aboard the vessel and could have terminated his employment at any time the vessel reached port.[3/] Since there was no other finding relevant, it is apparently on that basis that the District Court made its finding that appellant was 75% contributorily negligent. Appellant is not required, as will be shown hereafter, to leave his job

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3. Finding of Fact No. 6 (Clerk's Transcript, 78)

because of a dangerous and unsafe condition aboard the vessel of which he had knowledge, particularly where the injuries are such that they would not arouse any concern on his part in the first place. As long as the appellant remains on articles, he is not permitted to leave the vessel except under penalties, 46 USC 701.[4/]

This Court is in as good a position as the lower court to evaluate the testimony that is crucial to the instant case, San Pedro Campania Armadoras v.

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4. "§701. Various offenses; penalties

"Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

"First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

"Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more then two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

"Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay."

Yannacopoulos (5th Cir. 1956) 357 F.2d 737; Kulukundis v. Strand (9th Cir. 1953) 202 F.2d 708; Tawada v. United States (9th Cir. 1947) 162 F.2d 615. The only witness that testified on the issue of liability was appellant who was specifically found to be a credible and honest witness by the District Court (TR 115, L.80-81; TR 118, L.17-21). Appellant's testimony is in the transcript and is as available to this court as to the court below.

II

THE DISTRICT COURT'S FINDING OF CONTRIBUTORY NEGLIGENCE BY APPELLANT BECAUSE OF HIS FAILURE TO GET OFF THE VESSEL, ASK FOR A TRANSFER OF JOBS, OR MAKE COMPLAINTS TO THE SHIP'S OFFICERS WHEN HE DID NOT KNOW OF ULTIMATE SERIOUS CONSEQUENCES OF HIS INJURY, SUFFERED AS A RESULT OF APPELLEE'S NEGLIGENCE AND THE VESSEL'S UNSEAWORTHINESS, WAS IMPROPER AND TANTAMOUNT TO A FINDING OF ASSUMPTION OF RISK BY APPELLANT

The Court made the following finding of fact:[5/]

> "Plaintiff made no request to be transferred into another job or another location. He never complained to his union delegate with regard to the bumping. He neither reported the bumpings nor did he complain about them to any of the ship's officers or medical staff. However, on at least one occasion and perhaps on several occasions, he complained to the dish runners who were bumping him. Plaintiff was not required to stay aboard the vessel and he

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5. Finding of Fact No. 6 (Clerk's Transcript, 78)

"could have terminated his employment at any time the vessel reached port."

Plaintiff was not required to ask to be transferred to another job or to another location, and his not having done so was not contributory negligence. He was unaware of the seriousness of the bumpings. He did not complain to his union delegate or the vessel's officers because he thought nothing of the bumpings at the time, and likened it to "Bump your hand and it might hurt for a minute and you just ignore it " (TR 55, L.11-14). Appellant was at all times, prior to his diagnosed injury, unaware that the apparently harmless bumpings would lead to a serious leg disability (TR 55, L.105; TR 105, L.1-11). He did, however, make complaints to the dish runners, more out of annoyance than recognition of the seriousness of the injury to him.[6/] Appellant was under no requirement to change his working conditions, and remaining on the job does not constitute contributory negligence. In Koshorek v. Pennsylvania Railroad Co. (3rd Cir. 1963) 318 F.2d 364, Koshorek, an FELA railroad employee, developed lung symptoms because he remained on his job in

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6. Appellant testified as to what he told the dish runners: "Why, I just raised Sam with them." (TR 30, L.19)

the passenger shop over a period of time where dust and sand were blown about. The railroad was found to be negligent in failing to mitigate or prevent the hazard. In holding that Koshorek did not assume the risk by remaining on the job, the court said, at page 376, (citing Prosser on Torts, Sec. 55):

> "The retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of risk necessitates that a careful distinction between the two concepts be made in a case such as that at bar arising under the Act. If Koshorek's own conduct in relation to his injury be characterized as contributory negligence the Railroad may have a partial defense as to the amount of damages. If the same conduct be found to have constituted assumption of risk Koshorek's right to recover could not be affected in any respect. In Prosser, Torts §55 (1955), 304-305, it is stated: '* * * [W]here the two defenses overlap, there is a great deal of confusion of the two. Ordinarily it makes little difference which the defense is called. The distinction may become important, however, under such statutes as the Federal Employers' Liability Act, which has now abrogated the defense of assumption of risk entirely, but has left, contributory negligence as a partial defense reducing the amount of recovery. In working out the distinction, the courts have arrived at the conclusion <u>that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be</u>. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken

"to have known of them, and risks which he merely might have discovered by the exercise of ordinary care.' See also Potter v. Brittan, 286 F.2d 521 (3 Cir. 1961)." (Emphasis Added)

The Court below, it is respectfully urged, confused contributory negligence with assumption of risk. Assumption of risk has no place in maritime law since the Supreme Court decision of Socony Vacuum Oil Co. v. Smith (1939) 305 U.S. 424; Fonsell v. N.Y. Dock Railway (D.C.E.D. N.Y. 1961), 198 F.Supp. 332. In Socony Vacuum, supra, use of a defective appliance by a seaman while knowing it was defective was held not to constitute assumption of risk by the seaman. Said the court at page 430:

"The seaman while on his vessel is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of his duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special

even if there are unseaworthy conditions of which he is aware. The fact that Mr. DuBose knew of the defective working conditions does not justify a finding of contributory negligence against him, for such a finding below is tantamount to holding that he assumed the risk of the defective working condition, Smith v. United States (4th Cir. 1964) 336 F.2d 165; Movible Offshore Co. v. Ousley (5th Cir. 1965) 346 F.2d 870; Hildebrand v. United States (D.C.S.D. N.Y. 1954) 134 F.Supp. 514, affm'd (2nd Cir. 1955) 226 F.2d 215. Nor can appellant be charged with assumption of risk under another name, San Pedro Compania Armadoras v. Yannacopoulos, supra; Smith v. United States, supra; Holley v. The Manfred Stansfield (4th Cir. 1959) 269 F.2d 317.

The District Court also found that Mr. DuBose was not required to stay aboard the vessel and could have terminated his employment. It based this finding, presumably, on DuBose's own testimony (TR 51, L.20). Appellant, however, was in error when he testified (as he did) that he could have left the vessel "at any time." This court must take judicial notice of the fact that when a seaman is aboard a vessel and on articles, he cannot leave the vessel without penalties, 46 USC §701. From his Coast Guard discharge (Plaintiff's Exhibit No. 1),

it is clear that even if appellant had realized the seriousness of the bumpings, when he did not, he could not effectively have left the vessel "at any time."

III

EVEN IF THE COURT WERE JUSTIFIED IN MAKING A FINDING OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE APPELLANT, A FINDING OF 75% UNDER THE CIRCUMSTANCES OF THIS CASE IS CLEARLY ERRONEOUS AND IS NOT SUPPORTED BY THE EVIDENCE

The Court in its concluding remarks indicated that:

> "This man had to get the silver cleaned in the place assigned to him. Taking into account the motion of the sea, the confined quarters there, the dimensions of the racks and so on and so forth, it was almost tailor-made that the racks carried by the dishrunners would bump him, probably on the outside of his right knee, as they were carrying the racks to the galley. It could have been almost a built-in condition for that, it seems to me." (TR 116, L.7-14)

Very few are the cases that make a finding of contributory negligence of 75%. There must be an extreme finding of neglect by the seaman to justify such a finding, Ktistakis v. United Cross Nav. Corp. (2nd Cir. 1963) 324 F.2d 728; Asand v. Parisi (1st Cir. 1962) 297 F.2d 859. To hold that plaintiff's remaining on board the vessel constituted 75% contributory negligence is clearly not supported by the evidence, and the District Court must therefore be reversed.

APPENDIX

Exhibits Admitted as Evidence in the Court Below[8/]

Plaintiff's

1	Photocopy of Coast Guard Discharge	7
2-A 2-B 2-C 2-D	Photographs	11
3	Memorandum and Layout of Galley	12
4	Hospital Records	34
5	Discharge Records	42
6	Foot Brace	45
7	Income Tax Records	47

Defendant's

A	Copies of Excerpts of Medical Log	56
B	Records of Sailing and Termination Notice	100
C	Records of San Pedro Clinic	101

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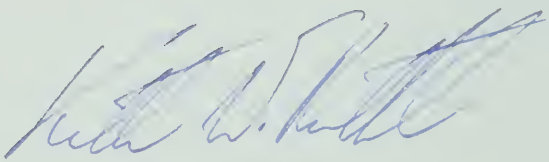
8. Pages refer to the Reporter's Transcript where the exhibit is identified and received into evidence

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with these rules.

Dated: October 24, 1967
San Francisco, California



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